MOTOROLA MALAYSIA SDN BHD A

v.

NG THIEN KEONG & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
AZIAH ALI J
[JUDICIAL REVIEW NO: R1-25-314-09]
15 NOVEMBER 2010

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application to quash Industrial Court award holding that 1st respondent dismissed without just cause or excuse - Allegation of pilfering spare parts in violation of company's Standard Operating Procedure - Whether unauthorized possession of company's property by 1st respondent proven - Industrial Court's decision quashed* C D

EVIDENCE: *Adverse inference - Evidence Act 1950, s. 114(g) - Failure to produce document - Company's Standard Operating Procedure ('SOP') not produced to assist court in deciding whether there had been a breach of SOP - Adverse inference only to be invoked for wrongful withholding or suppression of evidence - Adverse inference not invoked* E

LABOUR LAW: *Employment - Termination of service - Certiorari - Application to quash Industrial Court award holding that 1st respondent dismissed without just cause or excuse - Allegation of pilfering spare parts in violation of company's Standard Operating Procedure - Whether unauthorized possession of company's property by 1st respondent proven - Industrial Court's decision quashed* F

LABOUR LAW: *Industrial Court - Award - Certiorari - Application to quash Industrial Court award holding that 1st respondent dismissed without just cause or excuse - Allegation of pilfering spare parts in violation of company's Standard Operating Procedure - Whether unauthorized possession of company's property by 1st respondent proven - Industrial Court's decision quashed* G H

The 1st respondent was employed with the applicant as a Senior Technical Specialist. Pursuant to complaints from other employees that costs of spare parts used in 2001 was very high, an investigation was conducted. The investigation showed that the 1st respondent had ordered some spare parts and had also taken some spare parts from the store when he was only the Process I

Technician who was not required to repair machines. The 'Spare Parts & General Store System' ('SPGS System'), an internal software system used by the applicant to enable its employees to order parts and consumable parts for the use of the factory, showed that the 1st respondent had ordered many spare parts. Upon being queried, the 1st respondent had claimed that he was just clearing up the stock on behalf of the storekeepers. Each user of the SPGS System was given a User ID and a password which was confidential and encrypted. Without the Badge ID the user would not be able to place any order in the system. The 1st Respondent was a registered user of the SPGS system. A full list of all spare parts ordered by the 1st respondent since 2000 to 2001 was extracted from the system. There was no evidence to suggest that the 1st respondent's User ID, Badge and PIN had been compromised. The applicant issued a show cause letter to the 1st respondent requesting explanation on the following allegations of misconduct: (i) using his access facility to the SPGS System to order parts which were not related to his job assignment and were neither given authorization to do so; (ii) requesting through SPGS system and collecting two items which were later recovered in his personal locker; (iii) keeping the parts that belonged to Motorola in his personal locker; and (iv) receiving monetary favour from third parties in consideration of him handing over to them the parts that belonged to Motorola. These acts were claimed to be in violation of the company's Standard Operating Procedure ('SOP'). The 1st respondent tendered his resignation with immediate effect although he denied the allegations against him. The domestic inquiry found the 1st respondent guilty of all charges and he was dismissed. The Industrial Court found that the applicant failed to prove the charges against the 1st respondent and that his dismissal was without just cause or excuse. Hence this application for judicial review for an order of *certiorari* to quash the award of the Industrial Court.

Held (allowing the application with costs):

(1) The 1st respondent contended that parts may have been ordered using his access facility without his knowledge or authority. However, there was no evidence to show that the 1st respondent's access facility to the SPGS system had been compromised. (para 13)

(2) There was no proof of the 1st respondent's assertion that there was a practice of ordering parts to assist the storekeepers to balance inventory. Even if there was such a practice, it was not a practice that was known or condoned by the applicant and on the 1st respondent's own admission it was not part of his job scope to assist the storekeepers to balance the inventory. (para 18)

(3) With regard to the 2nd and 3rd charges, the 1st respondent stated that the parts were ordered by mistake. Despite the mistake, he conceded that he did not take any step to return the parts wrongly ordered or to bring it to the notice of his superior or place orders for the correct parts. Instead he kept these parts in his office. Whether the retention of the parts by the 1st respondent caused loss to the applicant or deprived the applicant of use was inconsequential. The Industrial Court failed to properly assess the evidence when it found that the applicant failed to prove unauthorized possession of the applicant's property by the 1st respondent. (paras 19 & 20)

(4) The Industrial Court took issue that the SOP was not produced to assist the court in deciding whether there had been a breach of the SOP. The non-production of the SOP cannot give rise to an adverse presumption and s. 114(g) of the Evidence Act 1950 was not applicable. An adverse inference under s. 114(g) can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. There was no withholding or suppression of evidence. If the Industrial Court was of the view that it should have sight of the SOP, the Industrial Court ought to have asked the applicant to produce the SOP. (para 23)

(5) The Industrial Court had committed errors of law by failing to consider relevant matters, taking into consideration irrelevant matters and drawing erroneous conclusions or inferences from proved or admitted evidence. (para 26)

Case(s) referred to:

Airspace Management Services Sdn Bhd v. COL (B) Harbans Singh Chingar Singh [2000] 4 CLJ 77 CA ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Lee Seng Kee v. Sukatno; Ong Thean Soo (Third Party) [2008] 1 LNS 226 HC ***(refd)***

A *Munusamy Vengadasalam v. PP [1987] 1 CLJ 250, [1987] CLJ (Rep) 221 SC* ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
B

Legislation referred to:
Evidence Act 1950, s. 114(g)
Rules of the High Court 1980, O. 53

C *For the applicant - Raymond TC Low; M/s Shearn Delamore & Co*
For the 1st respondent - Sukhwinder Singh; M/s AI Nathan

Reported by Amutha Suppayah

D

JUDGMENT

Aziah Ali J:

[1] The applicant applies for judicial review under O. 53 of the
E Rules of the High Court 1980 for an order of *certiorari* to quash the award of the Industrial Court No. 1131 of 2009 dated 17 September 2009 which found that the dismissal of the 1st respondent by the applicant was without just cause or excuse. Alternatively the applicant seeks for an order of *certiorari* to quash
F part of the decision of the Industrial Court awarding the 1st respondent backwages and compensation *in lieu* of reinstatement amounting to RM207,740. I allowed the application to quash the award of the Industrial Court (prayer (a) of encl. 1) with costs of RM3,000 to the applicant.

G

Background

[2] The 1st respondent commenced employment with the applicant on 19 May 1978 and at the time of his dismissal he held the post of Senior Technical Specialist. According to the applicant,
H in 2001 the manager of the 'Plastic Ball Grid Array' (PBGA) Back End Department, one Thean Ballan had complained to one FC Lee who was in the PBGA Front End Department that the costs of spare parts used in 2001 was very high. FC Lee then asked his subordinate COW5, the applicant's equipment engineer to
I check on the matter. From his investigation COW5 found that the 1st respondent had ordered some spare parts and had also taken some spare parts from the store when he was only the process

technician who was not required to repair machines. Repairs were done by equipment technicians. COW5 checked the SPGS system and discovered that the 1st respondent had ordered many spare parts. COW5 reported to FC Lee, who asked COW5 to check with the 1st respondent. COW5 checked with the 1st respondent who told him that he was just clearing up the stocks on behalf of the storekeepers. Subsequently an engineer of the Front End Department complained to COW5 that one spare part, ESEC Power Supply was not available in the store and asked who had taken the said spare part. COW5 checked the SPGS system and discovered that the 1st respondent had been ordering the said spare part.

[3] An investigation was carried out by the applicant's security manager (COW4) who sought the assistance of COW3, the applicant's systems analyst and administrator of the SPGS system who supported and managed the system, to check the SPGS system to examine the parts ordered by the 1st respondent. According to COW3, 'SPGS' is an acronym for 'Spare Parts & General Store System', an internal software system used by the applicant to enable its employees to order parts and consumable parts for the use of the factory. The system is used generally by clerks, secretaries, technicians, engineers and the general store. Each used is given a User ID and a password which is confidential. The password is also encrypted. A Badge ID is also given to the user to enable him to place orders in the SPGS system. Without the Badge ID the user would not be able to place any order in the system. The User ID, password and Badge ID is kept confidential by the user and cannot be shared. The 1st respondent was a registered user of the SPGS system.

[4] COW3 checked the SPGS system as requested and extracted from the system and printed out a full list of all spare parts ordered by the 1st respondent since 2000 to 2001 and gave the list to COW4. The list contained transaction date, stock number, vendor, description of the spare parts, actual quantity and value. The list was tendered during the hearing. COW3 testified that she found no evidence to suggest that the 1st respondent's User ID, Badge and PIN had been compromised. COW4 carried out an investigation and met with the 1st respondent and later put up a report.

[5] The applicant issued a show cause letter dated 25 June 2001 to the 1st respondent requesting explanation on the following allegations of misconduct:

> Re - Show Cause Letter
>
> It has been reported that you:
>
> (1) Have been using your access facility to the SPGS System to order parts/items, which were not related to your job assignment and were neither given authorization to do so. The parts/items in question are highlighted as attached in appendix 1. The transactions took place between 1st April 2000 until 30th May 2001.
>
> (2) Have requested through SPGS system and collected two items, namely, 1 unit of Touchdown impedance converter T0136 KISA-009E and two pieces of 73-E06A203E Guide Comply which were then recovered in your personal locker.
>
> (3) Have been keeping the parts/items that belong to Motorola as listed in Appendix II in your personal locker.
>
> (4) Through your admission that you have received monetary favour from Mr Ong from Sigma Electronics (M) Sdn Bhd. and Mr Vincent Tan from Excel Industrial Supplies (M) Sdn Bhd in consideration of you handing over to them the parts/ items that belongs to Motorola and causing loss to the Company.
>
> Therefore you are in violation of:
>
> (1) SOP NO: MMSB-1006(16) - Any act contrary and prejudicial to Company Standard Operating Procedure.
>
> (2) SOP NO: MMSB-1006(30) - Unauthorized possession of Company property.
>
> (3) SOP NO: MMSB-1006(27) - Receiving of gifts contrary to Motorola's code of ethics.
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> (4) SOP NO: MMSB-1006(25) - Theft or embezzlement.

[6] By a letter dated 26 June 2001 the 1st respondent tendered his resignation with immediate effect. Despite the resignation the 1st respondent gave his explanation *vide* a letter dated 3 July 2001 in which he denied the allegations. The applicant contended that he was pressured and threatened by the security manager

(COW4) and the regional manager and due to the pressure, threat and harassment he signed an admission. He then withdrew his admission but he never withdrew his letter of resignation.

[7] With reference to the show cause letter, in gist the applicant's explanation addressed to the applicant's employee relations manager is as follows:

(a) Item 1 – it was common practice amongst some of them to order parts/items through the SPGS system *vide* their access facility to assist storekeepers in maintaining a balanced inventory. This was never an issue and he was not aware that it was not supposed to be done. He admitted ordering only three of the items/parts listed. He alleged that there was a possibility that parts have been ordered using his access facility without his knowledge;

(b) Item 2 – the three items/parts were wrongly ordered on 26.6.2000 and in March 2001 as the items were ordered by code numbers without graphic description. In respect of one item, the Touchdown Impedance Converter, it was too late to return the item as the finance cut-off had been completed. He kept two other items/parts, the Guide Comply, in his office for purpose of using it during machine modification;

(c) Item 3 – some of the items/parts were unintentionally accumulated in his office over the years and were items necessary to be used in carrying out his functions. Some items he collected from caged containers (scrap) in the store and accessible to anyone for purpose of future machine modification;

(d) Item 4 – he denied receiving any monetary payment for handing any parts/items belonging to the Applicant to the persons named in the show cause letter or to any unauthorized persons.

[8] The applicant was dissatisfied with the explanation and issued a notice of domestic inquiry to be held on 11 July 2001.

Five charges were levelled against the 1st respondent as follows:

(1) That you have been using your access facility to the SPGS System to order parts/items, which were not related to your job assignment and were neither given authorization to do so. The parts/items in question are highlighted as attached in appendix I. The transactions took place between 1st April

2000 until 30th May 2001. Such act is prejudicial and contrary to Motorola's key belief that is 'Uncompromising Integrity' and the Company's Standard Operating Procedure and therefore is a misconduct as per SOP NO: MMSB-1006(16).

(2) That you have failed to exercise due diligence while performing your task when you have wrongly ordered 1 unit of Touchdown impedance converter TQ136-KISA-009E and 2 units of 73-E06A203E Guide Comply which was recovered later in your personal locker on 27th June 2001.

(3) That you have requested through the SPGA system and collected two items, namely, 1 unit of Touchdown impedance converter TQ136-KISA-009E and two pieces of 73-E06A230E Guide Comply which were then recovered in your personal locker. Together with that, items as per highlighted in appendix II were also recovered in your personal locker. This act is in breach of SOP NO: MMSB-1006(30) that is unauthorized possession of Company's property.

(4) That you on 19th January 2001 had collected 4 items of spare parts belonging to PLCC Department from the store Personnel as follows:

(i) 1 unit Power Supply (TQ73-E08005E)

(ii) 10 pieces of HF transducer screw (TQ76-K80AOOIE)

(iii) 3 pieces of blade EFO (TQ76-K80A001E)

(iv) 1 piece of wire clamp linear

The items above are not related to your job and you are not authorized to order neither to receive the items. This is an act that is contrary and prejudicial to Company's Standard Operating Procedure and therefore is a misconduct as per SOP NO: MMSB-1006(16).

(5) Through your admission that you have received monetary favour from Mr. Ong from Sigma Electronics (M) Sdn Bhd and Mr. Vincent Tan from Excel Industrial Supplies (M) Sdn Bhd in consideration of you handing over to them the parts/ items that belongs to Motorola and causing loss to the Company. This is an act that is contrary and prejudicial to Company's Standard Operating Procedure and therefor is a misconduct as per SOP NO: MMSB-1006(16). This is also misconduct as per SOP NO: MMSB-1006(25) - Theft or embezzlement.

[9] The domestic inquiry was held on 16 July 2001 and by letter dated 26 July 2001 the 1st respondent was notified that he was found guilty of all five charges. The 1st respondent was dismissed with immediate effect. He was given 30 days to submit an appeal to the general manager. His appeal was rejected.

[10] Before the Industrial Court, the applicant informed the court that they were unable to locate the domestic inquiry notes and would proceed *de novo*. The applicant also withdrew the 4th charge as the applicant was unable to locate the relevant witness. The hearing concluded with the Industrial Court finding that the applicant has failed to prove all the four charges against the 1st respondent and that the dismissal of the 1st respondent was without just cause or excuse. Hence this application for judicial review.

[11] It is trite that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable (*Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC). In judicial review the court will not conduct an examination into the merit of the decision but rather to the decision making process unless the decision is illegal, irrational, made with procedural impropriety and disproportionate (*R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147). Reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality or where the facts do not support the conclusion arrived at by the Industrial Court or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amenable to judicial review (*Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629).

[12] In respect of the 1st charge, the Industrial Court found as follows:

(a) the 1st respondent admitted ordering only two items in Appendix I;

(b) he ordered parts whenever storekeepers requested his help to balance the inventory even though these parts were not related to his job functions;

(c) this practice was confirmed by CLW1;

(d) COW2 the 1st respondent's former superior said he was not aware of this practice;

(e) apart from the applicant's contention that personnel with SPGS account are to order parts/items related to their work only, no evidence produced that such rules/directives were made known to the personnel;

(f) the applicant did not dispute the practice of storekeepers seeking the assistance of personnel to balance the inventory;

(g) the SOP NO: MMSB-1006(16) was not produced to assist the court to decide whether there had been a breach of SOP by the 1st respondent;

(h) the culture and practice of helping storekeepers to balance the inventory was made known to the applicant during investigation;

(i) no evidence the applicant conducted further investigation on the alleged practice;

(j) the applicant took action to rectify the situation to reduce the number of personnel using the SPGS system to enable the Internal Control team to have better control on users and cost of ordering spare parts after an e-mail dated 18 July 2001 was issued to maintain active users;

(k) the printed list of items (CO-23-24) shows that the 1st respondent had been ordering items that were not related to his work or wrongly ordered as early as 26 June 2000 which indicates no regular audit on SPGS users was carried out by the applicant.

Based on the above the Industrial Court found that the applicant has failed to prove the 1st charge.

[13] It is the 1st respondent's contention that parts may have been ordered using his access facility without his knowledge or authority. Counsel for the applicant submits that the Industrial Court has failed to consider that there was no evidence to show that the 1st respondent's access facility to the SPGS system had been compromised. Having perused the notes of evidence I agree with counsel for the applicant. The notes of evidence show that

whilst there are many personnel registered with access to the SPGS system including the 1st respondent, their User ID, password and Badge ID are personal and confidential known only to each individual user. Thus the only way an unauthorized person can order parts through the SPGS system is by using a registered user's confidential User ID, badge and PIN. COW3 has testified that there was no evidence to show that the 1st respondent's ID was compromised. The 1st respondent has not adduced any evidence to show that other unauthorized personnel had knowledge of the applicant's User ID, badge and PIN and had used his access facility to place orders for parts without his knowledge. The Industrial Court has failed to consider that the 1st respondent's assertion is a bare assertion.

[14] The evidence also shows that a registered personnel with access to the SPGS system could order parts/items without first getting approval from his superior indicating a lack of proper control measures in the procedure for ordering parts/items. But the regularity or irregularity of audit is irrelevant to the 1st respondent's contention that parts could have been ordered without his knowledge. In fact it appears that it was because of the irregular audit that personnel with access to the SPGS system could order parts without getting prior approval or could order parts not related to their job function and were getting away with it until 2001 when Thean Ballan brought to the attention of FC Lee that costs of spare parts were too high.

[15] The 1st respondent contends that it was common practice for personnel to order parts on the request of the storekeepers to help them balance the inventory even though the parts are not related to their job function. Counsel for the 1st respondent submits that the applicant cannot deny that they do not know of the practice. It is further submitted that there was inaction on the applicant's part to remedy the situation.

[16] The Industrial Court found that the applicant was only made known of the practice during investigation of the 1st respondent's case and that the applicant did not dispute the practice of storekeepers seeking the assistance of personnel to balance the inventory. I find this finding contrary to the evidence. The applicant adduced evidence through its witnesses that shows that they were not aware of the purported common practice of personnel with access facility to the SPGS system helping storekeepers to balance the inventory on the request of the

storekeepers. Further the evidence shows that upon discovery of the weakness in the procedure for ordering parts, the applicant took remedial steps as evident from the e-mail dated 18 July 2001 sent out by one PW Koh to all head staff requesting them to 'clean up' the system (exh. M to the statement of case).

[17] Counsel for the 1st respondent submits that the applicant gave latitude to the storekeepers to continue with such a practice and therefore the practice of helping storekeepers balance their inventory must have been intended to be included in the 1st respondent's job scope. I find counsel's submissions unsupported by the 1st respondent's own testimony under cross examination where the 1st respondent conceded that it was not part of his job scope to assist storekeepers to balance the inventory. The 1st respondent's testimony is as follows:

> 28. Is it part of your job scope to assist store-keeper to balance inventory.
>
> - No, but is common practice.

[18] With regard to the storekeepers, counsel for the 1st respondent submits that the applicant ought to have called the storekeepers to give evidence. The 1st respondent named the storekeepers as "Sathee and Ramlah" (exh. SRH9). In re-examination the 1st respondent named the storekeepers at the material time as "Satthi, Along and Josephine". It is the 1st respondent who made the assertion that the storekeepers asked him to assist them to balance the inventory. It is trite that he who asserts must prove (see *Lee Seng Kee v. Sukatno; Ong Thean Soo (Third Party)* [2008] 1 LNS 226). Therefore it is for the 1st respondent to prove his assertion. The applicant's counsel had informed the Industrial Court that the storekeepers were no longer with the applicant and the statements of the storekeepers would not be produced. The investigation report prepared by COW4 contained statements made by the storekeepers yet COW4 was not cross examined on the storekeepers' statement. Therefore as the matter stands there is no proof of the 1st respondent's assertion that there is a practice of ordering parts to assist the storekeepers to balance inventory. Even if there was such a practice, what is established from the evidence is that it was not a practice that was known or condoned by the applicant and on the 1st respondent's own admission it was not part of his job scope to assist the storekeepers to balance the inventory.

[19] With regard to the 2nd and 3rd charges, the 1st respondent states that these parts were ordered by mistake. Despite the mistake, he conceded that he did not take any step to return the parts wrongly ordered or to bring it to the notice of his superior or place orders for the correct parts. Instead he kept these parts in his office.

[20] The Industrial Court referred to the testimony of COW4 and the photographs taken and found that apart from the evidence of COW4 and the photographs, there is no other evidence to validate that the items were recovered from the 1st respondent's locker. Therefore the Industrial Court found that the applicant's witness was unable to confirm that the items were discovered from the 1st respondent's locker. I find the finding unsupported by evidence. According to COW4 he personally went to check the 1st respondent's locker and the parts were recovered from the 1st respondent's locker. A staff took photographs. There is no indication in the award as to why the Industrial Court found the evidence of COW4 insufficient to prove recovery of the parts from the 1st respondent's locker. Credibility and reliability of a witness are matters for the Industrial Court. The Industrial Court has failed to assess the credibility of COW4 and his evidence on the issue of discovery of the parts and has failed to state why his evidence is insufficient. I am of the view that the failure by the Industrial Court to make a proper assessment of the evidence of COW4 led to an erroneous conclusion that there is no evidence from the applicant's witness to validate the applicant's contention that the items were recovered from the 1st respondent's locker.

[21] The Industrial Court further found that the error in the date of discovery of the parts mentioned in the 2nd charge showed that the applicant had acted hastily. Counsel for the applicant had explained that the date was a typographical error. No doubt dates are material particulars in a charge but in the present case the applicant has offered an explanation regarding discrepancy in the dates. The Industrial Court has not indicated whether it finds the applicant's explanation reasonable. What is material is whether the 1st respondent was misled by the discrepant date. The Industrial Court has failed to consider this issue. From the evidence there is no suggestion that the 1st respondent was ever misled. In any event the date of discovery of the parts could be ascertained from the evidence. I am of the view that the Industrial Court failed to appreciate the issue in the 2nd and 3rd charges which is the discovery of the parts in the 1st respondent's locker which the

applicant contends is misconduct and a breach of SOP No. MMSB-1006(30) being unauthorized possession of company property. Whether the retention of the parts by the 1st respondent caused loss to the applicant or deprived the applicant of use is inconsequential. From the award I am of the view that in respect of the 2nd and 3rd charges the Industrial Court has failed to properly assess the evidence when it found that the applicant has failed to prove unauthorized possession of the applicant's property by the 1st respondent.

[22] With regard to the 5th charge (the 4th charge had been abandoned) it was framed based on the admission made by the 1st respondent which he subsequently retracted. Further the witness CLW2 denied giving any monetary reward to the 1st respondent. Therefore the Industrial Court rightly decided that the charge has not been proved.

[23] The Industrial Court took issue that the SOP was not produced to assist the court in deciding whether there had been a breach of the SOP. The Industrial Court found no evidence to show that the applicant's rules or directives were made known to the employees. Counsel for the 1st respondent submits that without the SOP it is impossible to determine whether the 1st respondent has committed the misconduct complained of. It is submitted that the applicant has failed to prove that the contents of the SOP were made known to the 1st respondent. In reply counsel for the applicant refers to the charges as framed in the show cause letter (exh. SRSH2) which listed out the relevant SOP and misconduct as follows:

(1) SOP NO: MMSB-1006(16) – Any act contrary and prejudicial to Company Standard Operating Procedure.

(2) SOP NO: MMSB-1006(30) – Unauthorized possession of Company property.

(3) SOP NO: MMSB-1006(27) – Receiving of gifts contrary to Motorola's code of ethics.

(4) SOP NO: MMSB-1006(25) – Theft or embezzlement.

[24] I note that the 1st respondent had not taken issue with the SOP whether in his letter of explanation, his testimony or in the statement of case. In the notice of domestic inquiry dated 9 July 2001 the relevant SOP and nature of misconduct were stated

(exh. SRSH5). The evidence shows that in the 1st respondent's letter of explanation dated 3 July 2001 no issue regarding the SOP was raised (exh. SRSH4). No issue regarding the SOP was raised in the statement of case (exh. SRSH6). Neither was it raised in the 1st respondent's witness statement (exh. SRSH10). Similarly the issue of the SOP was not raised when the 1st respondent testified in court. Therefore the evidence shows that insofar as the 1st respondent is concerned the SOP was not an issue. The Industrial Court failed to consider that the 1st respondent never contended that he had no knowledge of the SOP. The Industrial Court failed to consider that the 1st respondent had been in the applicant's employment since 1978 and it would be reasonable to infer that such a long serving employee would know of his employer's standard operating procedures that governs his conduct as an employee. In any event counsel for the 1st respondent was at liberty to raise the issue of the SOP with the applicant's witnesses but it was not done.

[25] Counsel for the 1st respondent submits that the court ought to invoke s. 114(g) of the Evidence Act 1950 against the applicant on the ground of suppression of material evidence for failure to produce the SOP. I am unable to agree with counsel. The non-production of the SOP cannot give rise to an adverse presumption and s. 114(g) is not applicable. An adverse inference under s. 114(g) can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence (per Mohamed Azmi SCJ in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250, [1987] CLJ (Rep) 221). In the present case there is no withholding or suppression of evidence. To my mind if the Industrial Court was of the view that it should have sight of the SOP, the Industrial Court ought to have asked the applicant to produce the SOP. The failure to obtain evidence could have been resolved by the Industrial Court during the hearing but it failed to do so. Such omission ought not to be held against the applicant.

[26] In *Airspace Management Services Sdn Bhd v. COL (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77 @ 86 the Court of Appeal said:

A On the other hand, we accept, of course, that it is entirely competent for the High Court in *certiorari* proceedings to disagree with the Industrial Court on the conclusion or the inferences drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference. An erroneous inference from proved or admitted facts is an error of law ...

B

Having considered the evidence available before the Industrial Court and the inferences and conclusions drawn by the Industrial C Court I find that the Industrial Court has committed errors of law by failing to consider relevant matters, taking into consideration irrelevant matters and drawing erroneous conclusions or inferences from proved or admitted evidence.

D For the aforementioned reasons I allowed the application in terms of prayer (a) of encl. 1 with costs of RM3,000 to be paid by the 1st respondent to the applicant.

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